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Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

NICHOLAS DESTEFANO,

Petitioner,

v.

BROADWING COMMUNICATIONS, INC;
BROADWING TELECOMMICATIONS, INC.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTION PRESENTED FOR REVIEW

Whether a mandatory arbitration provision in an employment agreement which specifically denies the arbitrator the authority to award punitive damages is enforceable as regards a claim by the employee of Title VII retaliatory discharge, a cause of action for which punitive damages are available under the statute.

STATEMENT OF INTERESTED PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were:

Nicholas DeStefano - Petitioner
Michael Jay Kuper - Counsel for Petitioner
Larry D. Knippa - Counsel for Petitioner
Broadwing Communications, Inc. - Respondent
Broadwing Telecommunications, Inc. - Respondent
Broadwing, Inc.(formerly Cincinnati Bell, Inc.) - Parent to Respondent
Nancy L. Patterson - Counsel for Respondent

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is non-published. The opinion of the United States District Court for the Southern District of Texas is non-published.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1) because the petition asks the Court to issue a writ of certiorari to review a case in the United States Court of Appeals for the Fifth Circuit. The Court of Appeals entered its opinion on August 20, 2002 and denied a petition for rehearing on August 20, 2002. This petition is being filed with the Clerk of this Court within 90 days from the date of the denial of the petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981a. Damages in cases of intentional discrimination in employment.

a) Right of recovery (1) Civil Rights

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act, and provided that the complaining party cannot recover under section 1981 of the title, the complaining party may recover compensatory and punitive damages as

allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

18 U.S.C. § 1964(c). Civil Remedies.

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

STATEMENT OF THE CASE

Petitioner Nicholas D. Destefano seeks review of a decision of the United States Court of Appeals for the Fifth Circuit affirming the district court's enforcement of a mandatory arbitration provision which specifically denies the arbitrator the right to award punitive damages contained in an employment contract as regards Petitioner's claim of Title VII retaliatory discharge, a cause of action for which punitive damages are available under the statute.[1]

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[1] 42 U.S.C.A. §1981a (a)(1).

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit opinion in this case conflicts with opinions of this court, most notably in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991), which confirmed the previous holdings of this court to the effect that while some statutory claims may be the subject of an enforceable arbitration agreement, "...[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.",[2] and "[S]o long as the prospective litigant effectively may vindicate {his or her} statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[3]

2. The Fifth Circuit opinion in this case conflicts with the opinion of the United States Court of Appeals for the Eleventh Circuit in *Paladino v. Avent Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998), wherein the court refused to enforce a mandatory arbitration provision agreement which authorized the arbitrator "*to award damages for breach of contract only....*" *Id* at p. 1055, because that language "...is fundamentally at odds with the purposes of Title VII because it completely proscribes an arbitral award of Title VII damages." *Id* at p. 1060.

3. This is an important issue because it affects the rights

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[2]*Gilmer*, at p. 1652, quoting *Mitsubishi* at 637.

[3]*Gilmer*, at p. 1553, quoting *Mitsubishi* at 628.

of countless employees whose substantive rights written into the Civil Rights Act of 1991[4] by Congress[5] are threatened by mandatory arbitration agreements excluding punitive damages from the remedies available to the arbitrator entered into as a requirement of their employment in defiance of the mandate of Congress: "American workers should not be forced to choose between their jobs and their civil rights." [6]

4. This court has recently granted certiorari in a case with a similar issue, *Pacificare Health Systems v. Book, Jeffrey, et al,* 285 F.3d 971 (11th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3264 (2002)(No. 02-215). The precise issue in *Pacificare* is whether arbitration clauses that preclude punitive damages are enforceable in a RICO suit in which treble damages would otherwise be recoverable under the statute.[7] The Court of Appeals for the Eleventh Circuit refused to enforce the arbitration clause as regards the RICO claim, relying on its

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[4]42 U.S.C. § 2000e to 2000e-17 (1994).

[5] "SEC. 2. FINDINGS AND PURPOSES (a) Findings. Congress finds that....(2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.... (b) Purposes. The purposes of this Act are to ....(2) strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination. 102 H.R. 40; Part I.

[6]*Id.* at 104.

[7]18 U.S.C. §1964(c).

previous holding in *Paladino,*[8] because "...the RICO claims in this case are based on a statutory remedy Congress has provided to any person injured as a result of illegal racketeering activities."[9] The issue in the instant case is in fact more clear cut than in *Pacificare* because here there is no question that punitive damages (instead of treble damages, as provided for by RICO) are provided for in the statute which is the basis of the claim which Petitioner is asserting. This court in *Gilmer*, rebutting the argument that the arbitration procedures in that case did not provide for equitable relief and class actions (but implicitly acknowledging that remedies are substantive rights in this context), pointed out that "...the...rules applicable here do not restrict the types of relief an arbitrator may award...."[10]

Petitioner's claim for relief in any event is more compelling than that of the Petitioner in *Pacificare* because employment contracts are generally entered into by employees as a condition of employment, and the waivers of statutory rights therein are not voluntary, while the waivers of statutory rights in commercial contracts, between commercial parties, such as in *Pacificare,* are ordinarily voluntary, resulting from negotiations. The Court is respectfully requested to decide this case and the *Pacificare* case as companion cases, or, at a minimum, to hold this petition until *Pacificare* is decided.

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[8] *Id.* at 973.

[9] *Id.* at 976.

[10] *Gilmer, supra,* at 33.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 01-20238

NICHOLAS DESTEFANO,

Plaintiff-Counter Defendant - Appellant - Cross-Appellee

verses

BROADWING COMMUNICATIONS, INC.
BROADWING TELECOMMUNICATIONS, INC.

Defendants-Counter Claimants-Appellees-Cross-Appellants.

Appeals from the United States District Court
for the Southern District of Texas
(H-00-CV-2661)

Filed August 20, 2002

Before GARWOOD and DENNIS, Circuit Judges and LITTLE, District Judge.*

GARWOOD, Circuit Judge:**

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*Chief District Judge of the Western District of Louisiana, sitting by designation.

**Pursuant to 5th Cir. R.47.5 the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Plaintiff-Appellant-cross-appellee Nicholas DeStefano (DeStefano) appeals the district court order compelling arbitration.[1] Defendants-appellees-cross-appellants Broadwing Communications, Inc. and Broadwing Telecommunications, Inc. (collectively, Broadwing) appeal an order of sanctions. We affirm the district court in all respects.

Facts and Proceedings Below

In the fall of 1998, Austin-based IXC Communications and its subsidiary, Eclipse Telecommunications, Inc. (Collectively, Eclipse) began acquisition discussions with Coastal Telephone Company (Coastal), a Houston-based telephone services company. Eclipse is now Broadwing. Coastal was a privately held company, owned by Andrew Bursten and other trustee entities (collectively, the Burstens). On May 10, 1999, Eclipse acquired Coastal from the Burstens.

DeStefano was Coastal's sales manager and the supervisor of a large telemarketing force. On January 8, 1999, DeStefano entered into an employment agreement (the agreement) with Eclipse. The agreement provided that DeStefano would be employed by Eclipse for three year term, commencing on the date that Eclipse acquired Coastal. The agreement further provided that if DeStefano were terminated "without cause," prior to the expiration of the agreement he would be entitled to certain severance payments.

The agreement also included an arbitration clause, which provided as follows:

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[1]As we understand it, plaintiff spells his name "DeStefano;" apparently through error it appears on the docket sheet and in the record as "Destephano."

> "Binding Arbitration. The parties hereby consent to the resolution by binding arbitration of all claims or controversies in any way arising out of, relating to or associated with this Agreement. Any arbitration required by this Agreement shall be conducted before a single arbitrator in Austin, Texas, in accordance with the commercial arbitration rules of the American Arbitration Association then existing, and any award, order or judgment pursuant to such arbitration may be enforced in any court of competent jurisdiction. The arbitration shall apply rules of Texas law and the parties expressly waive any claim or right to an award of punitive damages. All such arbitration proceedings shall be conducted on a confidential basis. Notwithstanding the foregoing, either party may seek injunctive or other equitable relief in a court of law without proceeding through arbitration."

The Burstens had placed a sum of "bonus money" in escrow with Craig Cavalier, the Burstens' attorney. DeStefano was to receive the escrowed funds if he remained employed with Coastal for one year after Eclipse acquired Coastal. If not, the funds were to revert to the Burstens.

In the fall of 1999, twenty-seven charges of discrimination were filed with the Equal Employment Opportunity Commission (EEOC) by employees in the Houston office of Coastal (now Eclipse). Several of these charges alleged that DeStefano had instigated a sexually-charged work environment or that he had engaged in racial discrimination and harassment.

Eclipse terminated DeStefano's employment on November 4, 1999. In December 1999, the Burstens filed suit against Broadwing in state court (the Bursten litigation),

seeking declaratory judgment regarding certain issues related to the purchase agreement. After his termination, DeStefano made demand upon Cavalier for payment of the bonus money being held in escrow. DeStefano alleges that Broadwing sent a letter to Cavalier stating, "Since the termination was for case, no monies should be paid to Mr. DeStefano." DeStefano filed an interpleader suit in state court with the Burstens and Cavalier to obtain the bonus money. Broadwing was not a party to that suit.

On June 27, 2000, DeStefano filed the instant suit against Broadwing in Texas state court. DeStefano alleged breach of contract, retaliatory discharge under Title VII, and tortious interference with contract. On August 2, 2000, Broadwing removed the case to the United States District Court for the Southern District of Texas, Houston Division and filed a counterclaim alleging fraud, breach of fiduciary duty, and negligence by DeStefano in connection with Eclipse's purchase of Coastal. Broadwing filed a motion to compel in the agreement. On October 30, 2000, the district court entered an order granting Broadwing's motion and dismissing DeStefano's suit against Broadwing (the arbitration order). On November 3, 2000, Broadwing joined DeStefano in a third-party action in the Bursten litigation, asserting the same causes of action originally brought as counterclaims against DeStefano in the instant suit.

On November 8, 2000, DeStefano filed a motion for sanctions seeking monetary sanctions and seeking to have the order compelling arbitration rescinded and the case reinstated. The district court held a hearing on the sanctions motion on December 19, 2000. On January 31, 2001, the district court granted a monetary sanction against Broadwing in the amount of $5,160.00, but declined to rescind the arbitration order.

DeStefano appeals the district court's refusal to rescind the arbitration order. In the alternative, DeStefano argues that the district court erred in ordering arbitration of his Title VII claim, his tortious interference claim, and Broadwing's counterclaims. Broadwing cross-appeals the district court's imposition of the monetary sanctions.

Discussion

1. Sanctions and Waiver

DeStefano argues that the district court erred by declining to rescind the arbitration order as part of the sanction for its finding of civil contempt. He argues that Broadwing waived its right to arbitration by filing the third-party claims against DeStefano in the Bursten litigation. Broadwing, on its cross-appeal, argues that the district court erred in holding Broadwing in contempt and ordering monetary santions.

We review a district court's order holding a party in contempt for abuse of discretion. *Martin v. Trinity Industries, Inc.*, 959 F.2d 42, 46 (5th Cir. 1992). The underlying factual findings are reviewed for clear error and the underlying conclusions of law are reviewed *de novo*. *American Arilines, Inc. v. Allied Pilots Ass'n.*, 228 F.3d 574, 578 (5th Cir. 2000). "A movant in a civil contempt proceeding bears the burden of establishing by clear and convincing evidence 1) that a court order was in effect, 2) that the order required certain conduct by the respondent, and 3) that the respondent failed to comply with the court's order." *Martin*, 959 F.2d at 47. Upon a finding of contempt, the district court has broad discretion in assessing sanctions to protect the sanctity of its decrees and the legal process. See *American Airlines*, 228 F.3d at 585.

We first address Broadwing's appeal of the district

court's finding of contempt. The district court did not clearly err in finding that Broadwing was in contempt of the arbitration order. It is undisputed that Broadwing joined DeStefano to the state court action four days after the district court entered the arbitration order. Broadwing inexplicably argues that it could not have violated the arbitration order because the arbitration order "in no way requires any definate or specific action on the part of Broadwing." Broadwing's motion to compel arbitratin requested, *inter alia*, the following relief: "Defendants [Broadwing] be ordered to submit all counterclaims to binding arbitration in accordance with Plaintiff's Employment Agreement." The arbitration order granted Broadwing's motion in full. The district court's order thus compelled Broadwing to submit its counterclaims to arbitration and the district court did not err in determining that submitting the *same* counterclaims to another forum - the state court- was a failure to comply with the arbitration order.

As an explanation of its joining DeStefano to the Bursten litigation, Broadwing asserted that there were communication delays and statute of limitation concerns on Broadwing's side. Nancy Patterson, counsel for Broadwing in this federal suit, asserted that the district court's arbitration order, entered on October 30, 2000, did not arrive in her office until November 2, 2000. Patterson explained that she was out of the office that day and did not become aware of the arbitration order until the late afternoon of November 3, 2000. The Bursten litigation was being handled, in state court, by another law firm, which, according to Broadwing, was unaware of the arbitration order when DeStefano was joined to the Bursten litigation on November 3, 2000. As the district court noted, Broadwing still did not dismiss DeStefano from the state court proceedings even after Broadwing became aware of the arbitration order and DeStefano had still not been dismissed as of December 29, 2000, when the district court held its hearing

on the sanctions motion. Broadwing also cited statute of limitations concerns regarding their fraud claims against DeStefano, although the fraudulent conduct allegedly took place in the fall of 1998 and the statute of limitations for a fraud claim in Texas is four years. Tex. Civ. Prac. & Rem. Code § 16.004. The district court labeled Broadwing's arguments "wholly disingenuous." Broadwing argues that he district court did not make a specific finding of bad faith. Bur the district court held specifically that Broadwing "wilfully violated this Court's order." *Id.* at 5, and, at any rate, "good faith is irrelevant as a defense to a civil contempt order," *Waffenschmidt v. Mackay*, 763 F.2d 711, 726. The district court did not abuse its discretion by holding that Broadwing was in contempt of the court's arbitration order.

The district court did not err in setting the amount of monetary sanctions at $5,160.00. The parties agree that this sum covers the cost of attorneys' fees charged to DeStefano in connection with bringing the motion for sanctions. As far as concerns monetary relief, this is the full amount that DeStefano requested. Compensation for losses sustained by the complainant is a proper purpose for sanctions awarded in a civil contempt proceeding. *American Airlines*, 228 F.3d at 585.

DeStefano also requested that the arbitration order by rescinded and the court case be reinstated as a further sanction for Broadwing's contemptuous conduct. DeStefano, in his brief to this court, compares Broadwing's conduct to that of a party which has waived its contractural right to arbitration. When a district court has held that a party's conduct amounted to waiver of its right to arbitate, we review that finding *de novo*. *Walver v. J.C. Bradford & Co.* 938 F.2d 575, 577 (5th Cir. 1991). However, in the instant case, we are considering conduct after arbitration has been sought and been ordered by the court, and we are reviewing a district court's assessment of

sanctions in respect to that order. Thus, we will still apply abuse of discretion review to the district court's determination that rescinding the arbitration order was not an appropriate sanction in this case. One proper purpose of a civil contempt sanction is to coerce the contumacious party into compliance with the court's order. *American Airlines*, 228 F.3d at 585. Rescinding the arbitration order would have served a precisely opposite purpose. It was within the district court's discretion to decline to rescind the arbitration order. The district court did not abuse its discretion by denying DeStefano's request of this sanction.

2. The Confidentiality Provision

Having held that the district court did not abuse its discretion by declining to rescind the arbitration order as a sanction, we now turn to DeStefano's challenges to the substantive merits of the arbitration order. We review the grant of a motion to compel arbitration *de novo*. *Webb v. Investacorp*. 89 F.3d 252, 257 (5th Cir. 1996),

> "Arbitration is a matter of contract between the parties, and a court cannot compel a party to arbitrate unless the court determines the parties agreed to arbitrate the dispute in question." *Pennzoil Exploration and Prod. Co. v. Ramco Energy*, 139 F.3d 1061, 1964 (5th Cir. 1998).
>
> > "In adjudicating a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two-step inquiry. The first step is to determine whether the parties agreed to arbitrate the dispute in question. The determination involves two considerations: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement. When

> deciding whether the parties agreed to arbitrate the dispute in question, courts generally...should apply ordinary state-law principles that govern the formation of contracts. In applying state law, however, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration cause itself must be resolved in favor of arbitration. The second step is to determine whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Webb*, 89 F.3d at 257-58 (internal citations and quotation marks omitted).

DeStefano first argues that the arbitration clause's provision that "arbitration proceedings shall be conducted on a confidential basis" renders the arbitration procedure an inadequate alternative to the judicial forum. He contends that the confidentiality provision would preclude the parties from making a record of the arbitration proceedings. Thereby precluding judicial review.

DeStefano relies on the following language from *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1655 (1991):

> "A further alleged deficiency of arbitration is that arbitrators often will not issue written opinions, resulting, Gilmer contents, in a lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law. The NYSE rules, however, do require that all arbitration awards by in writing, and that the awards contain the names of the parties, a summary of the issues in controversy, and a description of the award issued. In addition, the award decisions are made available to the public." (Internal

citations omitted).

Gilmer does not, as DeStefano contends, establish "minimal standards" of non-confidentiality. In the first place, the excerpted language does not constitute a holding of the court; it merely recounts a party's argument and the Court's explanation of why it was unavailing. In the second place, the *Gilmer* court went on the note that "Gilmer's concerns apply equally to settlements of ADEA claims, which...are clearly allowed." *Id.*

Additionally, DeStefano has not cited any evidence or authority to support his contention that the "confidential basis" provision would, in fact, preclude creation of a record.[2] Nor has he presented any evidence or authority to support his speculation that confidentiality would have a chilling effect on the production of witnesses. DeStefano's point of error related to the confidentiality provision is without merit.

3. The Waiver of Punitive Damages

DeStefano next argues that his Title VII claim cannot be subject to arbitration because the arbitration clause provides, "the parties expressly waive any claim or right to an award of punitive damages." DeStefano asserts that punitive damages

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[2]The arbitration clause further provides that the arbitration shall be conducted "in accordance with the commercial arbitration rules of the American Arbitration Association then existing." The current version of those rules has not been placed into the record, but we note that Broadwing has asserted, and DeStefano has not denied, that they require the creation of a record at the required of any party to the arbitration.

are a cause of action under Title VII and that, thus, they cannot be prospectively waived. *See Alexander v. Gardner-Denver Co.* 94 S. Ct. 1011, 1021-22 (1974). This argument is without merit.

If parties agree to arbitration, they will be held to it unless Congress has evinced an intention to preclude waiver of judicial remedies for the statutory rights at issue. *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3354-55 (1985). "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Id.* at 3353. Doubts are resolved in favor of arbitrability. *Id.*

Punitive damages are not a cause of action under Title VII; they are a remedy that Title VII makes available in certain instances. *See Rubinstein v. Administrators of the Tulane Educ. Fund*, 218 F.3d 392, 404 (5th Cir. 2000). "The potential unavailability of punitive damages is not a ground for denying effect to an otherwise valid agreement to arbitrate." *Morgan v. Smith Barney, Harris Upham & Co.* 729 F.2d 1163, 1168 n.7 (8th Cir. 1983); *see also, Great Western Mortgage Corp. v. Peacock*, 110 F. 3d 222, 232 (3d Cir. 1997) ("The availability of punitive damages is not relevant to the nature of the forum in which the complaint will be heard. Thus, availability of punitive damages cannot enter into a decision to compel arbitration.").

The arbitrator may consider the argument that the remedy of punitive damages may not be effectively waived for a Title VII claim. *See Shearson/American Express v. McMahon*, 107 S.Ct. 2332, 2340 (1987) ("[T]here is no reason to assume at the outset that arbitrators will not follow the law."); *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 105 S.Ct. 3346, 3354 (1985) ("By agreeing to arbitrate a

statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."). The arbitrator's decision would be subject to judicial review. *See Shearson/American Express*, 107 S. Ct. at 2340 ("[S]uch review is sufficient to ensure that arbitrators comply with the requirements of the statute.") It may not even be necessary to reach this issue if it is determined that DeSteafno's Title VII claim is without merit (or, even if meritorious, is not such as would support punitive damages under Title VII.[3]

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[3]DeStefano's Title VII claim alleged in relevant part:

"RETALIATORY DISCHARGE

15. Plaintiff would show that Defendant has violated 42 U.S.C. § 2000e-3 by firing him for investigating allegations of unlawful discrimination and for attempting to assist and participate in an EEOC investigation of those allegations.

16. Charges were filed with the EEOC against Defendants which included allegations against Plaintiff. Plaintiff undertook his own investigation. Defendant, through attorneys, instructed Plaintiff to stop his investigation. The Defendant directed Plaintiff to meet with representatives of Defendant to discuss the matter. When Plaintiff notified Defendant that he intended to bring his attorney with him, the Defendant objected. Plaintiff appeared at the scheduled meeting with his attorney, but representatives of Defendant would not meet

We hold that the district court did not err in holding that DeStefano's Title VII claim was arbitrable.

4. DeStefano's Tortious Interference Claim

DeStefano's next argument is that his tortious interference claim was outside the scope of the arbitration clause because it arose after his employment with Broadwing had ended. This argument is without merit.

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with them. In furtherance of its scheme to make Plaintiff a scapegoat and to deprive him of the benefits of his employment agreement, Defendant sought to preclude Plaintiff from using his lawyer. Shortly thereafter, Plaintiff was fired by Defendant with no explanation other than it was "for cause."

17. Based upon subsequent developments, it become clear that a goal of the new ownership was to make Plaintiff a scapegoat for the EEOC complaints, to suppress the facts about any culpability of the new owners, and to use an indemnity agreement from the prior owners and/or funds and benefits owing to Plaintiff to fund the settlement with the charging parties rather than conduct a good faith investigation into the complaints, and to deprive Plaintiff of the benefits of his employment contract. Each of (1) Plaintiff's attempt to investigate and participate in the EEOC charges investigation and (2) his use of a lawyer was a precipitating cause of the firing of Plaintiff."

The arbitration clause encompassed "all claims or controversies in any way arising out of, relating to or associated with this Agreement." The conduct that DeStefano alleges as the basis for his tortious interference claim is associated with the employment agreement with Broadwing (formerly Eclipse). DeStefano alleges that Broadwing tortiously interfered with his relationship with the Burstens by instructing Cavalier not to pay DeStefano the bonus money that the Burstens had put in escrow. The crux of DeStefano's argument is that Broadwing informed Cavalier that DeStefano was terminated "for cause" even though, according to DeStefano, the reasons for DeStefano's termination did not fall within the definition of "cause" as contained in the employment agreement.

In light of the strong federal policy favoring arbitration, doubts about the scope of an arbitration clause are resolved in favor of arbitration. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 103 S.Ct. 927, 941 (1983). "[A]rbitration should not be denied unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue." *Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34, 37 (5th Cir. 1990) (internal quotation marks omitted, citations omitted). An arbitration provision is generally interpreted according to ordinary state law principles governing the formation of contracts. *Webb*, 89 F.3d at 58; *see Metropolitan Prop. & Liab. Co. v. Bridewell*, 933 S.W. 2d 358, 361 (Tex. App.-Waco, 1996) (citing *Neal* in support of finding that a tortious interference claim was properly within the scope of an arbitration clause).

In an arbitration-related context, we recently mandated a board reading of the phrase "relates to" as used in a statute. *See Beiser v. Weyler*, 284 F.3d 665, 669 (5th Cir. 2002). *Beiser* involved interpretation of "relates to" as that phrase is used in

a statute conferring jurisdiction. *Id.* This is, of course, not equivalent to a holding that similar phrases in an arbitration agreement must be interpreted in that fashion. Still, in a general way, we find *Beiser* instructive as to the ordinary meaning of a broad formulation such as the one we interpret here–"in any way arising out of, relating to or associated with." This formulation is broad enough to encompass DeStefano's claim, which was based on his assertion that the terms of the agreement entitled him to receive the bonus money and severance benefits. Because we resolve any doubts in favor of arbitrability, we conclude that the district court did not err in holding that DeStefano's tortious interference claim was within the scope of the arbitration agreement.

5. Remaining Points of Error

On appeal, DeStefano raises two arguments that were not made in the district court: (1) He argues that Broadwing's counterclaims were not properly within the scope of the arbitration clause, and (2) he argues that he may not be compelled to arbitrate his tortious interference claim because it is against Texas public policy to permit waiver of punitive damages for such a claim. DeStefano concedes that these issues were not properly preserved for appeal. This court will not, as a general rule, consider issues not raised in the district court. *United States v. Parker*, 722 F.2d 179, 183 (5th Cir. 1983). We decline to do so here.[4]

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[4]We note that, at any rate, our analysis of the punitive damages issue as it related to the Title VII claim would dispose of the same argument as it relates to the tortious interference claim.

We further observe that DeStefano informs us that Broadwing has dismissed its state court suit (third party

Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED.

---

claim) against him.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-00-2661

NICHOLAS DESTEFANO,

Plaintiff

verses

BROADWING COMMUNICATIONS, INC. BROADWING TELECOMMUNICATIONS, INC.

Defendants

Filed October 30, 2000

ORDER GRANTING DEFENDANT'S PETITION TO COMPEL ARBITRATION AND DISMISSAL OF LITIGATION

HITTNER, District Judge

Pending before the Court is the Petition to Compel Arbitration and Request for Dismissal of Litigation (Instrument #4) filed by Defendants Broadwing Communications, Inc. and Broadwing Telecommunications, Inc. Having considered the motion, submissions on file, and applicable law, the Court determines that the petition should be granted.

Plaintiff Nicholas DeStefano ("DeStefano") filed the

instant suit in state court on June 27, 2000 alleging causes of action for breach of contract, tortious interference with contract, and retaliatory discharge in violation of 42 U.S.C. § 2000e-3 ("Title VII"), arising out of the termination of his employment with Defendants Broadwing Communications, Inc. and Broadwing Telecommunications, Inc. (collectively "Broadwing"). Broadwing removed the action to this Court on August 2, 2000. Broadwing now moves this Court to compel binding arbitration pursuant to an arbitration clause contained in DeStefano's employment contract and dismiss the instant suit. DeStefano opposes arbitration, claiming that the Federal Arbitration Act is inapplicable to DeStefano's employment contract, the arbitration clause is invalid because it does not encompass all of DeStefano's claims, the arbitration clause precludes full relief, and the arbitration clause would deprive DeStefano of his right to appeal.

"Arbitration is a matter of contract between the parties, and a court cannot compel a party to arbitrate a dispute unless the court determines the parties agreed to arbitrate the dispute in question." *Pennzoil Exploration and Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1064 (5th Cir. 1998) (citations omitted). In order to determine whether the parties agreed to arbitrate their dispute, a court must engage in a two-step inquiry: "(1) whether a valid agreement to arbitrate between the party exists; and (2) whether the dispute in question falls within the scope of that arbitration agreement." *Id.* At 1065. If the court finds that the parties agreed to arbitrate and that the dispute in question falls within the scope of arbitration agreement, the court must then determine "whether any federal statute or policy renders the claims nonarbitrable." *R.M. Perez & Assoc., Inc. v. Welch*, 960 F.2d 534, 538 (5th Cir. 1992) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *accord Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996).

There is a strong presumption in favor of arbitration. *E.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991). The Federal Arbitration Act ("FAA") provides that "[a] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. It is undisputed that on January 8, 1999 the parties entered into a valid employment contract for a term of three years which contains an arbitration clause. Specifically, paragraph 5.12 of the Employment Agreement signed by DeStefano provides:

> The parties hereby consent to the resolution by binding arbitration of all claims or controversies in any way arising out of, relating to or associated with this Agreement. Any arbitration required by this Agreement shall be conducted before a single arbitrator in Austin, Texas in accordance with the commercial arbitration rules of the American Arbitration Association then existing, and any award, order or judgment pursuant to such arbitration may be enforced in any court of competent jurisdiction. The arbitrator shall apply rules of Texas law and the parties expressly waive any claim or right to an award of punitive damages. All such arbitration proceedings shall be conducted on a confidential basis. Notwithstanding the foregoing, either party may seek injunctive or other equitable relief in a court of law without proceeding through arbitration.

The Court therefore finds that the arbitration clause is valid, irrevocable and enforceable.

DeStefano argues that the FAA does not apply to his employment contract because Section 1 of the FAA provides "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. DeStefano describes his job as "supervising employees in obtaining customers for the telephone transmissions provided by BROADWING." In other words, DeStefano supervised telemarketers. DeStefano contends that "[t]he economic value of the transmission of electrical and electronic signals in interstate commerce is as significant as the movement of goods, people, mail, and packages." In support of this contention, DeStefano cites to *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999), *cert. granted*, 120 S.Ct. 2004 (U.S. May 22, 2000) (No. 99-1379).

The focus of the arbitration exception confided in 9 U.S.C. § 1, however, is not the goods traveling in commerce; rather the focus is the nature of the job in question. Seamen and railroad employees are themselves physically engaged in the movement of goods in foreign or interstate commerce by the very nature of their employment. It is this distinct characteristic that qualifies these categories of workers for the arbitration exception. *See Rojas v. TK communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) (radio disc jockey not qualified for arbitration exception because exception only applies to employees "actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are"). "[T]he exclusionary language in § 1 is to be narrowly construed." *Id.* "Any broader interpretation of [§ 1] would undermine its significance." *Miller v. Public Storage Management, Inc.*, 121 F.3d 215, 217 (5th Cir. 1997). If radio disc jockeys, who are also engaged in "the transmission of ... signals in interstate commerce," do not come within the purview of the arbitration exception, neither do managers of

telemarketing businesses. The FAA clearly applies to DeStefano's employment contract.

The Court must next determined if DeStefano's claims fall within the scope of the arbitration clause. *Pennzoil*, 139 F.3d at 1064. DeStefano argues that the arbitration clause does not encompass his claim for tortious interference. However, the conduct DeStefano claims qualifies as tortious interference, to wit, Broadwing's denial of DeStefano's employment bonus, clearly falls within the purview of "claims or controversies in any way arising out of, relating to or associated with [his employment contract.]" DeStefano's claims are therefore within the scope of the arbitration clause.

The Court must next determine "whether any federal statute or policy renders the claims nonarbitrable." *Perez*, 960 F.2d at 538 (citations omitted). DeStefano argues that the relatively recent United States Supreme Court decision in *Wright v. Universal Maritime Service Corporation*, 525 U.S. 70 (1998), precludes employment discrimination claims from arbitration unless the arbitration clause specifically waives the federal forum by clear and unmistakable reference.

In *Wright*, however, the Supreme Court resolved a single issue: "whether [the] general arbitration clause in a collective-bargaining agreement (CBA) requires an employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U.S.C. § 12101 *et seq.*" *Id.* at 72. The Court stated that such a waiver in a collective-bargaining agreement must be "explicitly stated" by "clear and unmistakable" language in order to be valid, irrevocable and enforceable. *Id.* at 80. The *Wright* case therefore appeared to call into question a prior Supreme Court case, *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991), where the Court held that

"statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Id.* at 26. According to *Gilmer*, "a claim brought under the Age Discrimination in Employment Act of 1967 (ADEA), ... could be subject to compulsory arbitration pursuant to an arbitration provision in a securities resignation form." *Wright*, 525 U.S. at 76.

Justice Scalia, writing for a unanimous court, distinguished *Wright* from *Gilmer*: "*Gilmer* involved an individual's waiver of his own rights, rather than a union's waiver of the rights of represented employees-and hence the 'clear and unmistakable' standard was not applicable." *Id.* at 80-81. *Gilmer* and its progeny are therefore controlling in the instant case and the arbitration clause at issue need not explicitly refer to the waiver by "clear and unmistakable language. Rather, "claims brought under the Title VII are ... within the boundaries of the FAA" and DeStefano is bound by the arbitration clause in his employment contract. *Miller*, 121 F.3d at 218; *Rojas*, 87 F.3d at 749.

DeStefano next argues that the arbitration clause is invalid because it precludes full Title VII relief. Specifically, DeStefano challenges the provision which waives recovery of punitive damages. DeStefano claims that punitive damages qualify as an indispensable element of a Title VII cause of action. Citing *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 51-52 (1974), DeStefano claims that "[a] party cannot be required to prospectively waive a cause of action under Title VII." Punitive damages, however, qualify as a remedy, not a cause of action. Hence, "[t]he potential unavailability of punitive damages is not a ground for denying effect to an otherwise valid agreement to arbitrate." *Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163, 1168 n.7 (8th Cir. 1983), cited with approval in, Kinnebrew v. Gulf Ins. Co.*,

No. 3:94-CV-1517-R, 1994 WL 803508 at *2 n.10 (N.D. Tex. Nov. 28, 1994); *accord Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 232 (3rd Cir. 1997) (finding that contractual waiver of punitive damages is irrelevant to the issue of whether the plaintiff's claims should be arbitrated, even if such claims are recoverable under the statute). Indeed, "a contractual waiver of punitive damages is not a valid ground for refusing to compel arbitration." *Herrington v. Union Planters Bank, N.A.*, No. 2:98 CV231GR, 2000 WL 424232 (S.D. Miss. Jan 21, 2000) (page number unavailable).

Finally, DeStefano argues that the requirement of confidentiality in the arbitration clause deprives him of his right to appeal. Such a contention is without merit. Under the FAA, a party can seek judicial review of an arbitrator's decision. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995); *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752, 757 (5th Cir. 1999). Confidentiality only precludes the parties from publicizing the event in question. It is similar to the sealing of a record. Confidentiality, however, does not preclude the development of a record for appeal; nor does it preclude a party from judicial review. Indeed, such an effect would be contrary to federal law and would be preempted by the FAA. *See e.g.*, 9 U.S.C. § 10 (judicial review of arbitration award procured by corruption, fraud, or undue means or where arbitrator exceeded his powers).

When all claims before the court are subject to a valid, irrevocable and enforceable arbitration agreement, the proper remedy is to dismiss the complaint. *Fedmet Corp. v. M/V Buyalyk*, 194 F.3d 674 678 (5th Cir. 1999); *Alfred v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992). Accordingly, the Court hereby

ORDERS that Defendants' Petition to Compel

Arbitration and Request for Dismissal of Litigation (Instrument #4 is GRANTED. The instant case is DISMISSED.

SIGNED, at Houston, Texas, on this the 30th day of October, 2000.

Supreme Court, U.S.
FILED
DEC 20 2002
CLERK

No. 02-770

In The
Supreme Court of the United States

NICHOLAS DESTEFANO,

Petitioner,

v.

BROADWING COMMUNICATIONS, INC.;
BROADWING TELECOMMUNICATIONS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether a district court must compel arbitration of a plaintiff's Title VII claim, which is encompassed by the language of an arbitration provision in an employment agreement, even though the parties to the employment agreement agreed to waive punitive damages as a remedy in all of their disputes arising out of the employment agreement.

STATEMENT OF INTERESTED PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were (a) plaintiff-appellant Nicholas DeStefano; (b) counsel for plaintiff-appellant Michael Jay Juper and Larry D. Knippa; (c) defendants-appellees Broadwing Communications Inc. and Broadwing Telecommunications Inc.; and (d) counsel for defendants-appellees Nancy L. Patterson and Anton Pal Montaño.

CORPORATE DISCLOSURE STATEMENT

Broadwing Telecommunications Inc. (Respondent) is a subsidiary of Broadwing Communications Services Inc., which is a subsidiary of Broadwing Communications Inc. (Respondent). Broadwing Inc. is a publicly-held company and is the parent corporation of Broadwing Communications Inc. There is no parent or publicly-held company owning ten percent or more of Broadwing Inc.

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OPINIONS BELOW

Both the opinion of the United States Court of Appeals for the Fifth Circuit and the opinion of the United States District Court for the Southern District of Texas are unpublished. The opinions are attached in the appendix of Petitioner's Petition for Writ of Certiorari ("Petition").

COUNTER-STATEMENT OF JURISDICTION

This Court has jurisdiction over the Petition under 28 U.S.C. § 1254(1) because the Petition asks the Court to issue a writ of certiorari to review a case decided by the United States Court of Appeals for the Fifth Circuit. The jurisdiction of the federal courts was originally invoked under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and under 28 U.S.C. § 1331 (federal question jurisdiction). However, Petitioner has misrepresented the proceedings in the Fifth Circuit court. Petitioner actually failed to file any "petition for rehearing" in this case. Therefore, contrary to what Petitioner stated in the "Statement of Jurisdiction" in his Petition for Writ of Certiorari, the Fifth Circuit appellate court did not deny any "petition for rehearing" in the instant case. (*See* Pet. for Writ of Cert. ("Pet.") at 1).

STATUTORY PROVISIONS INVOLVED

This case involves §§ 2 and 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and 42 U.S.C. § 1981(a). The text of these statutory provisions is set forth in the appendix to this brief.

COUNTER-STATEMENT OF THE CASE

This case is an appeal of the Fifth Circuit court's opinion affirming the district court's order compelling the arbitration of Petitioner Nicholas DeStefano's and Respondents Broadwing Communications, Inc.'s and Broadwing Telecommunications, Inc.'s (collectively, "Broadwing") claims against each other. Among other claims, DeStefano alleged a Title VII retaliation claim against Broadwing which he now argues should not be subject to arbitration. 42 U.S.C. § 2000e-3.

The facts pertinent to this matter began in the Fall of 1998 when acquisition discussions began between Austin-based IXC Communications, its subsidiary Eclipse Telecommunications, Inc. (collectively "Eclipse"), and Houston-based Coastal Telephone Company ("Coastal"). (R 146-148).[1] DeStefano served as Coastal's Sales Manager and was, in effect, the "number two man" at Coastal. By all accounts, it was DeStefano's unique style and energy which had led to Coastal's significant financial performance. (R 147). DeStefano managed the sizeable telemarketing force which was the heart of Coastal's business. Naturally, therefore, DeStefano, as a key representative of Coastal, was involved in the due diligence acquisition discussions with representatives of Eclipse. (R 148). Broadwing contends that during these initial discussions, DeStefano made material and fraudulent misrepresentations and/or material omissions of fact about Coastal's

[1] "R" indicates a reference to the Record on Appeal. "RX" indicates a reference to Appellees' Record Excerpts set forth in the appellate court. Although the Record is not before this Court, these citations are provided out of courtesy to the Court.

workforce, sales operations and sales environment among other things, which contributed materially to the ultimate decision by Eclipse to purchase Coastal. (R 52-55, 148).

On January 8, 1999, DeStefano executed an Employment Agreement with Eclipse Telecommunications, Inc. which included an arbitration provision. (R 37, RX: I). The Employment Agreement provided that DeStefano would become an employee of Eclipse upon the closing of the Purchase Agreement and continue his duties in running the sales force in the Houston Office. The sales transaction closed on May 10, 1999, whereupon DeStefano became an Eclipse employee pursuant to the terms of the Employment Agreement. (R 148).

The arbitration provision contained in Paragraph 5.12 of the Employment Agreement states as follows:

> 5.12 *Binding Arbitration.* The parties hereby consent to the resolution by binding arbitration of all claims or controversies in any way arising out of, relating to or associated with this Agreement. Any arbitration required by this Agreement shall be conducted before a single arbitrator in Austin, Texas in accordance with the commercial arbitration rules of the American Arbitration Association then existing, and any award, order or judgment pursuant to such arbitration may be enforced in any court of competent jurisdiction. The arbitrator shall apply rules of Texas law and the parties expressly waive any claim or right to an award of punitive damages. All such arbitration proceedings shall be conducted on a confidential basis. Notwithstanding the foregoing, either party may seek injunctive or other equitable relief in a court of law without proceeding through arbitration.

In the Fall of 1999, only a few short months after the sale, twenty-seven (27) individual Charges of Discrimination were filed with the Equal Employment Opportunity Commission ("EEOC") by employees in the Houston Office of Coastal, now Eclipse. Many of these charges listed DeStefano as the primary instigator of a highly sexually-charged hostile work environment. Several charges also alleged that DeStefano and others had engaged in overt racial discrimination and racial harassment. (R 146). The Company immediately began an internal investigation of these charges. (R 146).

DeStefano's employment was terminated on November 4, 1999, pursuant to Section 4.3 of the Employment Agreement. (R 46). The EEOC conducted its own administrative investigation of the various discrimination charges from late October 1999 through March 2000. That investigation confirmed significant improper conduct by DeStefano. In May 2000, Broadwing, having acquired IXC and Eclipse, participated in a mediation with the various charging parties and the EEOC which resulted in a global settlement of the underlying discrimination charges. (R 145-146).

On June 27, 2000, DeStefano filed a lawsuit in State Court in Harris County, Texas against Broadwing for breach of the January 1999 Employment Contract; retaliatory discharge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3; and tortious interference with contract. (R 19). Under federal question jurisdiction, Broadwing removed the case to the United States District Court on August 2, 2000. (R 23). On August 15, 2000, Broadwing filed its Motion to Compel Arbitration along with its Answer with Counterclaims against DeStefano. (R 49, 64). Broadwing's counterclaims dealt with allegations

of fraud, breach of fiduciary duty, gross negligence, and negligence by DeStefano based on his participation in the acquisition discussions which led to the purchase of Coastal by IXC. (R 64). In addition, Broadwing asserted a breach of contract claim based on DeStefano's Employment Agreement. In filing its Petition to Compel Arbitration, Broadwing sought to have all claims between DeStefano and Broadwing subjected to arbitration because it is Broadwing's opinion that all claims from both parties are subject to the arbitration provision found in the Employment Agreement. (R 49). On September 5, 2000, DeStefano filed his Opposition to Broadwing's Motion to Compel Arbitration. (R 82). On October 31, 2000, the District Court entered an Order directing arbitration of all issues between the parties and dismissed the lawsuit. (R 92, 93).

On February 26, 2001, DeStefano filed his Notice of Appeal challenging the Order compelling arbitration. (R 162). On August 20, 2002, after briefs had been filed and oral argument had concluded, the United States Court of Appeals for the Fifth Circuit filed its opinion affirming the trial court's Order compelling arbitration, and entered its judgment in the case. The Fifth Circuit correctly determined that DeStefano through the arbitration agreement had waived any claim to an award of punitive damages. (*See* Pet. at A-10-11). Moreover, although Title VII allows the recovery of punitive damages, the appellate court held that the waiver of punitive damages did not prevent the arbitration of DeStefano's Title VII claim because (1) punitive damages did not represent a "right" to assert a cause of action, but were merely "a remedy that Title VII makes available in certain instances"; and (2) it was for the arbitrator in the first instance to "consider the argument

that the remedy of punitive damages may not be effectively waived for a Title VII claim." (*See* Pet. at A-11). Noting that the arbitrator's decision was always subject to judicial review, the court reasoned that it "may not even be necessary to reach this issue [of punitive damages] if it is determined that DeStefano's Title VII claim is without merit (or, even if meritorious, is not such as would support punitive damages under Title VII)." (Pet. at A-12).

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT

The crux of Petitioner's argument is that his Title VII claim against Broadwing would be appropriate for arbitration *but for* the Petitioner's waiver of punitive damages in his arbitration agreement. Based upon that assumption, Petitioner mistakenly argues that the Fifth Circuit opinion allowing Petitioner's Title VII claim to be arbitrated conflicts with opinions of this Court, such as *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991), because the parties to the arbitration agreement expressly waived punitive damages as a remedy for the arbitrated claims. (Pet. at 3). Petitioner specifically cites to language in *Gilmer* and *Mitsubishi Motors* that, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628).

However, this language does not conflict with the Fifth Circuit's opinion.

Neither *Mitsubishi Motors*, nor *Gilmer*, expressly prevents the arbitration of a plaintiff's Title VII claims where the plaintiff has waived any claim of punitive damages in the arbitration forum. To the contrary, the Fifth Circuit's opinion proceeds according to the Supreme Court's arbitration precedent. Indeed, where the language in the arbitration clause encompasses certain statutory claims, *Gilmer* and *Mitsubishi Motors* set forth that parties to the arbitration clause must live by the language unless Congress says otherwise:

> Although all statutory claims may not be appropriate for arbitration, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."

Gilmer, 500 U.S. at 26. Accordingly, the Fifth Circuit correctly considered the arbitrability of Petitioner's Title VII claim under this settled standard.[2] (*See* Pet. at A-11).

Moreover, this Court's recent decision in *Howsam v. Dean Witter Reynolds, Inc.*, __ U.S. __, __ S.Ct. __, 2002 WL 31746742 (U.S. Dec. 10, 2002) (No. 01-800), further

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[2] The Record reveals that Petitioner failed to show that Congress intended to preclude the waiver of punitive damages from Title VII claims. *See also Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 121 S.Ct. 513, 521-22 (2000) (arbitration clause was valid where petitioner failed to support her argument that she was unable to vindicate her statutory rights in arbitration because of prohibitive costs).

clarifies that issues of "waiver" are for the arbitrator to decide in the first instance, not for the court. *Howsam,* 2002 WL 31746742, *4. In *Howsam,* this Court held that an arbitrator, not the courts, must interpret the application of the six-year time limit provisions of the arbitration rules for the National Association of Securities Dealers. *Id.* at *4-5. Significantly, although the courts should determine the "question of arbitrability" about "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy," the Court reasoned that questions of time limitations and "waiver" were "procedural questions" left appropriately to the arbitrator to decide in the first instance:

> At the same time the Court has found the phrase "question of arbitrability" *not* applicable in other kinds of general circumstance where parties would likely expect that an arbitrator would decide the gateway matter. Thus "'procedural' questions which grow out of the dispute and bear on its final disposition" are presumptively *not* for the judge, but for an arbitrator, to decide. *John Wiley* [*& Sons, Inc. v. Livingston,* 376 U.S. 543, 557 (1964)] (holding that an arbitrator should decide whether the first two steps are prerequisites to arbitration). So, too, the presumption is that the arbitrator should decide "allegation[s] of *waiver*, delay, or a *like defense to arbitrability*." *Moses H. Cone Memorial Hospital* [*v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25 (1983)].

Howsam, 2002 WL 31746742, at *3 (emphasis added). Accordingly, the Fifth Circuit in its opinion below correctly compelled arbitration of Petitioner's Title VII claim, concluding under Supreme Court precedent that "[t]he arbitrator [in the first instance] may consider the argument

that the remedy of punitive damages may not be *waived* for a Title VII claim." (*See* Pet. at A-11) (emphasis added). Petitioner thus fails to prove that a conflict exists with this Court's opinions.

II.

THE DECISION BELOW DOES NOT PRESENT A CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION IN *PALADINO V. AVNET COMPUTER TECHNOLOGIES, INC.*

No conflict exists among the circuits regarding the arbitrability of Title VII claims where the parties have waived the availability of punitive damages in the arbitration agreement. Petitioner wrongly asserts that the Fifth Circuit's opinion in this case conflicts with the opinion of the United States Court of Appeals for the Eleventh Circuit in *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998).[3] (*See* Pet. at 3). Unlike the

[3] *Paladino* is the only case that Petitioner mistakenly identifies as being in "conflict" with the Fifth Circuit Court of Appeals. On the other hand, numerous courts clearly apply the reasoning in the Fifth Circuit's case to allow the waiver of punitive damages for claims falling within the scope of an arbitration clause. *See, e.g., Larry's United Super, Inc. v. Werries*, 253 F.3d 1083 (8th Cir. 2001) (allowing Racketeer Influenced Corrupt Organizations Act ("RICO") claim to proceed to arbitration despite language in arbitration clause excluding punitive damages); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 231-32 (3rd Cir. 1997) (noting that "a contractual waiver of punitive damages is not a valid ground for refusing to compel arbitration"), *cert. denied*, 522 U.S. 915 (1997); *Herrington v. Union Planters Bank, N.A.*, 113 F.Supp.2d 1026, 1032 (S.D.Miss. 2000) (class action under Truth in Savings Act was still enforceable regardless of contractual waiver of punitive damages), *aff'd*, 265 F.3d 1059 (5th Cir. 2001) (table); *Kinnebrew v. Gulf Ins. Co.*, 1994 WL 803508 (N.D.Tex. 1994) (rejecting plaintiff's

(Continued on following page)

instant case, however, the arbitration clause in *Paladino* had the following language seemingly *excluding all* Title VII and other non-contract suits from arbitration:

> *The arbitrator is authorized to award damages for breach of contract only, and shall have no authority whatsoever to make an award of other damages.*

Id. at 1056 (court's emphasis). The *Paladino* court contrasted the language seemingly excluding entire categories of suits from arbitration with arbitration clause language that seemed to *include* Title VII and other statutory suits:

> To that end, *the Company and I consent to the settlement by arbitration of any controversy or claim arising out of or relating to my employment or the termination of my employment.*

Id. (court's emphasis). Reading the two clauses together, the court concluded that the two provisions "work[ed] hand-in-glove to make it difficult for the employee to obtain *any* [Title VII] relief" because "if an arbitrator were to award [the plaintiff] *classic Title VII relief such as back pay or reinstatement*, a court applying the FAA could *vacate* the award." *Id.* at 1061 (emphasis added). In particular, the appellate court focused on the language in the clauses limiting the arbitration award to "breach of contract only" since "Title VII actions are, of course, not contracted." *Id.* Thus, the court reasoned "[w]hen an

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argument that an arbitration policy which did not allow for punitive damages, among other damages, denied her "substantive right" to sue for sex discrimination under the Texas Commission of Human Rights Act).

arbitration clause has provisions that defeat the remedial purpose of the statute, . . . the arbitration clause is not enforceable." *Id.* at 1062.

Significantly, both the Eleventh Circuit in *Paladino* and the Fifth Circuit in the instant case engage in "questions of arbitrability." However, unlike *Paladino*, DeStefano's arbitration clause does not rule out *all* relief under Title VII so as to defeat the remedial purpose of the statute. For instance, DeStefano's arbitration clause does not "*completely proscribe*[ ] an arbitral award of Title VII damages." *Paladino*, 134 F.3d at 1060 (emphasis added). Indeed, if DeStefano proceeds with arbitration and prevails on his Title VII claim, the arbitrator may still award him significant "*classic Title VII relief*," *id.* at 1061 (emphasis added), *e.g.*, back pay or lost compensation, reinstatement, compensatory damages for emotional distress, and attorney's fees. In short, both parties in this case have adequately and voluntarily given up one form of relief, punitive damages, but they have not at all given up their ability to assert a cause of action under Title VII or other statutes.[4] Thus, the *Paladino* opinion does not at all conflict with the Fifth Circuit's decision in the instant case.

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[4] Broadwing's counterclaims against DeStefano also seek "exemplary" damages for DeStefano's actions, including DeStefano's creation of a hostile work environment which caused Broadwing significant expense. (R 64). Naturally, exemplary damages for these claims by Broadwing would be similarly excluded in arbitration proceedings.

III.

A WRIT OF CERTIORARI IS NOT WARRANTED MERELY BECAUSE THIS CASE INVOLVES THE ARBITRATION OF EMPLOYMENT DISPUTES

Although this case arises out of the employment context, this Court has no compelling reason at this time to review the Fifth Circuit's decision compelling the arbitration of Petitioner's Title VII claim. Petitioner wrongly argues that review is compelled because "countless employees whose substantive rights written into the Civil Rights Act of 1991 by Congress are threatened by mandatory arbitration agreements excluding punitive damages from the remedies available to the arbitrator entered into as a requirement of their employment in defiance of the mandate of Congress." (Pet. at 3-4). However, not only has Petitioner failed to introduce anything into the Record below showing that Congress intended to preclude the waiver of punitive damages in Title VII cases, but nothing exists to truly differentiate employment arbitration agreements from commercial ones.

Petitioner argues that the waiver of punitive damages in employment arbitration agreements compels this Court's attention, but ignores Supreme Court precedent emphasizing that courts under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, are compelled to enforce employment arbitration agreements just as much as other arbitration agreements. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001) ("We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context."). In fact, the Supreme Court has observed that "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of

particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc.*, 532 U.S. at 123. Accordingly, lacking any compelling reason to warrant review, this Court should decline to grant Petitioner's request for writ of certiorari.

IV.

A WRIT OF CERTIORARI IS NOT WARRANTED BASED UPON THIS COURT'S DECISION TO REVIEW *PACIFICARE HEALTH SYSTEMS, INC. V. BOOK*

This Court's pending review of the Eleventh Circuit appellate court's decision in *Pacificare Health Systems, Inc. v. Book,* 285 F.3d 971 (11th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3264 (2002) (No. 02-215), does not provide a compelling reason at this time to review the Fifth Circuit's decision below. Petitioner wrongly argues that a compelling reason exists at this time to review the Fifth Circuit's opinion in this case because the *Pacificare Health Systems* case deals with a "similar issue." (Pet. at 4-5). Petitioner requests that this Court "decide this case and the *Pacificare* case as companion cases, or, at a minimum, . . . hold this petition until *Pacificare* is decided." (Pet. at 5). However, the *Pacificare* case is wholly distinguishable from the instant case and does not present a compelling reason to review the Fifth Circuit's decision.

Unlike the present case, *Pacificare Health Systems* asks whether a district court must compel the arbitration of a plaintiff's RICO claims, which allow for treble damages, when the arbitration agreement waives any claim for punitive damages. *Pacificare Health Systems, Inc.*, 285

F.3d at 973. In *Pacificare Health Systems,* the Eleventh Circuit affirmed the district court's holding that "those arbitration clauses that exclude punitive damages are unenforceable in this suit because they preclude recovery of treble damages under RICO." *Id.* at 973. The parties in the suit were subscribers and physicians who sued various health maintenance organizations (HMOs) for RICO violations, among other claims. *Id.* at 973.

DeStefano's Title VII claim, however, does not involve RICO treble damage provisions and further is an employment retaliation, not a commercial, arbitration matter. Consequently, some of the questions uniquely facing the *Pacificare* case, but not DeStefano's case, include (1) whether Congress intended to preclude any limitation of punitive damages in RICO claims, (2) whether RICO treble damages are actually "punitive" in nature, (3) whether the particular arbitration language at issue did in fact waive RICO treble damages, and (4) whether a plaintiff may obtain effective relief for his RICO claims under the language of the arbitration clause. Far from being "companion cases," all of the RICO issues are irrelevant to DeStefano's Title VII cause of action.

Moreover, Petitioner is wrong to argue that his "claim for relief in any event is more compelling than that of the Petitioner in *Pacificare* because employment contracts are generally entered into by employees as a condition of employment, and the waivers of statutory rights in commercial contracts, between commercial parties, such as in *Pacificare*, are ordinarily voluntary, resulting from negotiations." (Pet. at 5). As noted in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), however, the courts have long "reject[ed] the supposition that the advantages of the arbitration process somehow disappear when transferred

to the employment context." *Circuit City Stores, Inc.*, 532 U.S. at 122-23. Moreover, Petitioner's argument conveniently overlooks his own work history with Broadwing. As a well-compensated executive, Petitioner can hardly argue that the arbitration provision in his employment agreement was at all coerced. In any case, at this point, Petitioner has waived all arguments that his arbitration agreement was the result of duress, fraud, or any other ground existing in law or equity. Accordingly, there is no compelling reason for this Court to review the Fifth Circuit's decision.

CONCLUSION

For these reasons, this Court should deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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APPENDIX

9 U.S.C. § 2. – Validity, irrevocability, and enforcement of agreements to arbitrate. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract

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9 U.S.C. § 4. – Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in

accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof

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42 U.S.C. § 1981a. – Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964

(42 U.S.C. 2000e-5, 2000e-16) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2, 2000e-3, 2000e-16), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-16) (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112(b)(5)) or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)).

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party –

(A)

in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B)

in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C)

in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D)

in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section –

(1)

any party may demand a trial by jury; and

(2)

the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means –

(A)

in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B)

in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.).

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section

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